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from one hospital or house to another at intervals of two or three weeks was not necessary confinement. There is a relaxation from this literal and strict position in *Mutual Benefit Association v. Nancarrow*, 18 Col. App. 274; *Dulany v. Fidelity & Casualty Co. of N. Y.*, 106 Md. 17; *Scales v. Masonic Protective Association*, 70 N. H. 490, where the taking of outdoor exercise, on a doctor's advice, was deemed consistent with a "necessary confinement" condition. A very liberal interpretation is seen in *Hoffman v. Michigan Home & Hospital Association*, 128 Mich. 323 (2 of the 5 judges dissenting), viz., that visits to a doctor, walks on his advice, visits away for a change of scenery, do not constitute a breach of this condition. The total disability clause in health policies, such as that in the instant case, which the court did not pass upon, also receives interpretations both literal and liberal. Literal interpretations are seen in *Saveland v. Fidelity & Casualty Co. of N. Y.*, 67 Wis. 174; *Lyon v. Railway Passenger Assur. Co.*, 46 Ia. 631. However, by weight of authority, a liberal interpretation is adopted, viz., that a total disability clause is satisfied if the assured is unable, in a substantial and material sense, to do his usual business in substantially the usual way. *Young v. Travellers' Ins. Co.*, 80 Me. 244; *Turner v. Fidelity & Casualty Co. of N. Y.*, 112 Mich. 425; *Neafie v. Manufacturers' Accid. Indemnity Co.*, 8 N. Y. S. 202; *Lobdill v. Laboringmen's Mut. Aid Assoc. of Chatfield*, 69 Minn. 14; *Mut. Benefit Assoc. v. Nancarrow*, 18 Col. App. 274. The courts in the minority in holding to a literal interpretation of this clause suggest that the assured should refuse the total disability policy and demand a partial disability policy. Under this literal interpretation the circumstances of the instant case would not constitute total disability inasmuch as the plaintiff was able to go to his office each day for a short time. Almost certainly this would not be the view of courts adopting the liberal interpretation.

LANDLORD AND TENANT—EVICTION—INTERFERENCE WITH SUB-LESSEE.—The plaintiff, the lessee of the defendant, occupied part of the premises leased and sub-let the remainder. Defendant wrote to the sub-tenants forbidding them to pay rent to the plaintiff, representing that the latter had no right to the premises, and collected the rents. Plaintiff moved out and sued for eviction. *Held*, that there was no eviction, since there was no ouster or interference with the plaintiff's beneficial use of the premises. *Aguglia v. Cavicchia*, (Mass., 1918), 118 N. E. 283.

The case presents the situation of an alleged eviction from part of the premises leased—that part being a reversion—and a subsequent abandonment of the portion occupied by the lessee himself. In a technical sense there can be no physical interference with incorporeal property. Recognizing this difficulty, the courts have utilized the doctrine of constructive eviction in the case of disturbances of the enjoyment of easements and reversions, and have applied the rule that, "any obstruction by the landlord to the beneficial enjoyment of the demised premises, or diminution of the consideration of the contract by the acts of the landlord, amounts to a constructive eviction." *Lewis v. Payn*, 4 Wend. 423. In *Lewis v. Payn*, a constructive eviction was found when the original landlord distrained on the premises of the sub-

lessees for rent due to the lessee; the court added that this amounted to "something more than a constructive eviction". This elaboration was probably added because an actual eviction from a reversion is impossible. In that case the eviction was from the entire reversion—the lessee was in possession of no part of the demised premises. In *Dyett v. Pendleton*, 8 Cow. 727, the lessee sub-let part and remained in possession of part. When the landlord committed acts amounting to a constructive eviction the sub-tenant and the lessee both moved out. It was held that the lessee was evicted from the whole of the premises including the reversion. But in that case there was actual disturbance of the lessee's quiet enjoyment of the part he himself occupied. The eviction from the reversion can be said to have been included when the lessee was evicted from his part, since an eviction from part is an eviction from the whole. The theory is that the wrong-doer will not be allowed to apportion his wrong. *Ibid*, 731; *Leishman v. White*, 1 Allen 489; *Lawrence v. French*, 25 Wend. 443. Assuming for the present that the landlord's acts in the principal case were of the quality to effect a constructive eviction from the reversion, the question arises whether this would take in the part actually occupied by the lessee and abandoned by him. It is submitted that this conclusion ought to follow, since, as indicated above, an eviction from part is an eviction from the whole. The fact that we are trying to pass from an eviction from incorporeal property to an eviction from corporeal property ought to raise no difficulties, since, as regards the landlord who is a wrong-doer, the nature of the tenant's right interfered with should be immaterial—for the reversion is equally a part of the premises demised. The writer has been unable to find any cases exactly analogous on this point. There is a dictum in *Burn v. Phelps*, 1 Starkie 94, where the lessee sub-let to several sub-lessees one of whom was evicted by the original landlord; Lord Ellenborough there said that the lessee might have pleaded an eviction from the whole of the premises which would have included the portion occupied by the other sub-lessees. An analogy might be drawn from those cases where an eviction from an easement is held to justify an abandonment of the remainder of the premises. *The West Side Savings Bank v. Newton*, 57 How. Pr. (N. Y.) 152. It is doubtful whether the court in the principal case came to the correct conclusion when it denied that the acts of the landlord amounted to a constructive eviction. The rent due to the lessee is part of the substance of the lessee's beneficial enjoyment. He should not be forced to sue his sub-tenants for rent which they would have willingly paid had it not been for the landlord's intermeddling. An eviction has been found in the following cases under facts quite similar. *Burn v. Phelps*, *supra*; *Lewis v. Payn*, *supra*; *Leadbeater v. Roth*, 25 Ill. 478; *Burhans v. Monier*, 38 App. Div. (N. Y.) 466. The court in the principal case indicates that the sub-tenants were estopped to deny their landlord's title. This is a misapplication of the doctrine of estoppel, which can operate only between the parties to a suit; it cannot bind strangers to it. *South v. Deaton*, 113 Ky. 312. At most there was only a potential estoppel. Since *Dyett v. Pendleton*, *supra*, the right of the tenant to defend by showing a constructive eviction

when sued for rent due him has been put on the grounds of failure of consideration due to the acts of the landlord. But this defense to the performance of a contract can not operate when the tenant himself sues. This right has been given by some courts on the theory of an implied agreement of the landlord not to interfere with the performance by the tenant. *McDowell v. Hyman*, 117 Cal. 67; 29 HARV. L. REV. 555; contra, *Malzy v. Eichholz*, [1916], L. R., 2 K. B. Div. 308. The acceptance of this view would remove the last obstacle to the tenant's right to recover in this case.

MALICIOUS PROSECUTION—JUDICIAL PROCEEDINGS TO TEST SANITY.—Under a statute authorizing a proceeding before a justice of the peace to determine whether a resident alleged to be insane was a proper subject for treatment and entitled to be maintained at the state hospital the defendant maliciously commenced action against the plaintiff. In defence to an action for malicious prosecution the defendant claimed the action to have been extra-judicial. *Held*, that the proceeding was judicial and adequate to support the action. *Treloar v. Harris*, (Ind., 1917), 117 N. E. 975.

The initial requirement that in order to show a good cause of action for malicious prosecution a criminal proceeding must have been instituted by the defendant has been so far cut down that some courts, as the above, will allow recovery where any judicial proceeding has been commenced. There is, however, considerable variance on this matter. It is well settled in England and America that the action will lie where criminal proceedings have been set on foot. *Else v. Smith*, 2 Chit., 304; *Dennis v. Ryan*, 65 N. Y. 385; *Sweet v. Negus*, 30 Mich. 406; also, where the suit is a civil one and involves arrest of person or attachment of property, *Harr v. Ward*, 73 Ark. 437; *Tomlinson and Sperry v. Warner*, 9 Ohio 104; *Smith v. Cattel*, 2 Wils. K. B. 376; or where the action results in special damage to business or reputation, viz.: proceedings to wind up a trading company, *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, 11 Q. B. Div. 674—proceedings to declare one a bankrupt, *Chapman v. Pickersgill*, C. P. 2 Wils. 145; *Wilkinson v. Goodfellow-Brooks Shoe Co. et. al*, 141 Fed. 218—inquisition of lunacy, *Dordoni v. Smith*, 82 N. J. L. 525. Many courts in this country allow the action for the institution of any civil judicial proceeding, *Closson v. Staples*, 42 Vt. 209; *Kolka v. Jones*, 6 N. D. 461. The leaning seems to be in this direction, NEWELL ON MALICIOUS PROSECUTION, 32; 1 COOLEY ON TORTS, (3rd Ed.) 350. Indiana adheres to the latter view, *Coffey v. Myers*, 84 Ind. 105; *McCardle v. McGinley*, 86 Ind. 538. Even though the principal case involves a non-criminal proceeding without arrest or attachment of property it would be in accordance with the doctrine of the Indiana courts since there is the added feature of special damage to reputation, *Lockenour v. Sides*, 57 Ind. 360. However, the case has one peculiarity in that the judicial proceeding does not purport to adjudicate or conclude the mental status of the person alleged to be insane, but merely declares that the person as fit to be admitted to one of the hospitals, which is the only purpose for which the statute was enacted, *Naanes v. State*, 143 Ind. 299. The same case arose in California